

NO. 15-3097

**IN THE
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

JAMES W. LEWIS, JR.,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

Appeal from the Board of Veterans' Appeals

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. ISSUES PRESENTED FOR REVIEW	1
II. STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Course of Proceedings and Disposition Below	1
C. Statement of Facts	2
III. ARGUMENT	3
A. Summary of the Argument	3
B. The Board Failed in its Duty to Assist by Relying on Inadequate Examination Reports	4
1. The Medical Examination Reports Failed to Consider Evidence of Through-and-Through Muscle Damage	5
2. The Medical Examination Reports Failed to Consider Whether the Veteran Has Residual Muscle Injuries	6
C. The Board Failed to Address all Issues Reasonably Raised by the Record	7
IV. CONCLUSION	8

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Beyrle v. Brown</i> , 9 Vet. App. 377 (1996)	5
<i>El-Amin v. Shinseki</i> , 26 Vet. App. 136 (2013)	5, 7
<i>Green v. Derwinski</i> , 1 Vet. App. 121 (1991)	4
<i>Jones v. Principi</i> , 18 Vet. App. 248 (2004)	5
<i>Myler v. Derwinski</i> , 1 Vet. App. 571 (1991)	5
<i>Schafrath v. Derwinski</i> , 1 Vet. App. 589 (1991)	6, 8
<i>Schroeder v. West</i> , 212 F.3d 1265 (Fed. Cir. 2000).....	6
<i>Solomon v. Brown</i> , 6 Vet. App. 396 (1994)	7
<i>Tropf v. Nicholson</i> , 20 Vet. App. 317 (2006)	7
<i>Tucker v. West</i> , 11 Vet. App. 369 (1998)	8
STATUTES	
38 U.S.C. § 5103A(a)(1)	4
38 U.S.C. § 5103A(d)(1)	4
REGULATIONS	
38 C.F.R. § 4.2.....	5, 6
38 C.F.R. § 4.56.....	4, 5, 7

38 C.F.R. § 4.56(b)	5
38 C.F.R. § 4.73	4, 5, 7
38 C.F.R. § 20.202	7

OTHER AUTHORITIES

<i>Omentum</i> , The American Heritage College Dictionary, 970 (4th ed. 2002)	2
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RECORD CITATIONS

R. 2 (2–12) (BVA decision)	2
R. 3 (2–12) (<i>id.</i>)	2
R. 4 (2–12) (<i>id.</i>)	3
R. 5 (2–12) (<i>id.</i>)	3
R. 7 (2–12) (<i>id.</i>)	3
R. 10 (2–12) (<i>id.</i>)	2
R. 38 (38–39) (substantive appeal)	2
R. 53 (53–60) (statement of the case)	2
R. 80–94 (VA medical exam)	1, 6
R. 113 (113–15) (notice of disagreement)	1
R. 154–61 (VA medical exam)	1, 6
R. 279 (279–281) (rating decision)	2
R. 281 (279–281) (<i>id.</i>)	3
R. 356 (VA medical record)	2, 6, 8
R. 360 (VA medical record)	2, 6, 8
R. 366 (VA medical record)	2, 6, 8
R. 370 (368–70) (VA medical record)	3, 6, 8
R. 433 (433–39) (rating decision)	1

R. 433–34 (433–39) (<i>id.</i>)	1
R. 565 (DD Form 214)	2

I. ISSUES PRESENTED FOR REVIEW

A. Whether the Board of Veterans' Appeals ("Board") failed in its duty to assist by relying on medical examination reports that evaluated service-connected status post stab wounds for scarring but failed to address evidence of underlying muscle damage, including through-and-through injuries, under 38 C.F.R. § 4.56?

B. Whether the Board failed in its duty to address all issues reasonably raised by the record when the medical evidence directly raised the issue of muscle damage, but the Board failed to address ratings based on muscle damage, including through-and-through injuries?

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant ("Mr. Lewis" or "the Veteran") appeals the denial of compensable ratings for service-connected stab wound residuals.

B. Course of Proceedings and Disposition Below

Mr. Lewis filed a claim for increased evaluation in June 2010. R. 433 (433–39). He underwent Department of Veterans Affairs ("VA") medical examinations for his stab wound residuals in November 2010, R. 154–61, and October 2012, R. 80–94, but neither examination addressed either the previous damage to the underlying muscles or any current residual muscle injuries. In an April 2011 rating decision, the Regional Office ("RO") denied an increased rating for the service-connected status post stab wounds (excluding the left cheek). R. 433–34 (433–39). Mr. Lewis filed a notice of disagreement in July 12, 2011, R. 113 (113–15), a statement of the case was issued in

January 2013, R. 53 (53–60), and a timely appeal to the Board ensued later that month, R. 38 (38–39).

The Board issued the decision now on appeal on April 29, 2015. R. 2 (2–12). Affirming the RO, the Board denied Mr. Lewis’s claim for entitlement to increased, (compensable) disability evaluations for status post stab wounds to the right posterior chest, right lower abdomen, and right lower leg. R. 10 (2–12).

The Veteran filed a timely notice of appeal to this Court on August 17, 2015.

C. Statement of Facts

Mr. Lewis served on active duty in the U.S. Navy from August 1976 to August 1980. R. 3 (2–12), 565. During an assault in San Diego, California, in January 1979, Mr. Lewis was stabbed with a knife in, *inter alia*, his right-posterior chest, right-lower abdomen, and right-lower leg. R. 279 (279–281). It was determined that these wounds were incurred in line of duty, and not due to misconduct. *Id.* At the hospital after the assault, the physician noted “eight separate holes in various portions of the small intestine,” R. 356, that there “[appeared] to be omentum hanging out of the [abdomen] wound,” and that the “abdominal wound does have viscera extruding from the stab site,” R. 360. The physician also found that the laceration to the right-lower leg was “deep to the bone and muscle tissues with partial muscle severance,” R. 360, and “extending through the anterior compartment muscle,” R. 366.¹ The surgical report also indicated that the wound to the leg went “through the fascia compartment and into the anterior

¹ Omentum is “[o]ne of the peritoneal folds connecting the stomach and other abdominal organs.” The American Heritage College Dictionary, 970 (4th ed. 2002).

tibial muscles in two places for a total length of probably 15 cm.” R. 370 (368–70). In a March 1981 rating decision, the Veteran was assigned non-compensable ratings for his service-connected status post stab wound residuals of the right posterior chest, right lower abdomen, and right lower leg. R. 281 (279–281).

In the appealed decision, the Board first found that VA satisfied its duties to notify and assist under the Veterans Claims Assistance Act of 2000 (citations omitted here). R. 4 (2–12). According to the Board, Mr. Lewis was “afforded VA examinations responsive to the claim for increased ratings for his service-connected status post stab wounds.” R. 5 (2–12). The Board found that “[t]he examination reports contain all the findings needed to rate [Mr. Lewis’s] service-connected status post stab wounds, including history and clinical evaluation.” *Id.*

The Board then found that the Veteran’s service-connected stab wound residuals did not approximate the criteria for higher, scar-related compensable disability evaluations for the entire rating period under Diagnostic Codes 7801 through 7805. R. 7 (2–12).

III. ARGUMENT

A. Summary of the Argument

Mr. Lewis makes two assignments of error. First, the Board failed in its duty to assist by relying on inadequate examination reports that evaluated scarring from service-connected stab wounds but failed to address muscle damage, including evidence of through-and-through injuries.

Second, the Board failed to address all issues reasonably raised by the record by not considering direct evidence of damage to the underlying muscles as a result of service-connected stab wounds.

Because the Board's decision to deny Mr. Lewis increased (compensable) ratings was based on insufficient and inaccurate medical examination reports, remand to the Board for further examination to determine whether the Veteran previously suffered a through-and-through muscle injury or currently has residual muscle damage as a result of any service-connected post-stab wounds under 38 C.F.R. §§ 4.56, 4.73.

B. The Board Failed in its Duty to Assist by Relying on Inadequate Examination Reports

The Board erred by relying on inadequate examination reports that evaluated the Veteran's service-connected stab wound residuals, but failed to address damage to the underlying muscles under 38 C.F.R. § 4.56. The Secretary's duty to assist includes making "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). In a case for disability compensation, the assistance "shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." § 5103A(d)(1). The medical examination must be "thorough and contemporaneous" and take into account the records of prior medical treatment. *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991). "[I]f the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for

evaluation purposes.” 38 C.F.R. § 4.2; *see also El-Amin v. Shinseki*, 26 Vet. App. 136, 139–40 (2013).

1. The Medical Examination Reports Failed to Consider Evidence of Through-and-Through Muscle Damage

In rating the service-connected post stab wound residuals, the Board erred by relying on medical examinations that failed to consider evidence of through-and-through muscle damage. Muscle damage is generally evaluated under 38 C.F.R. § 4.56 and individual muscle groups are rated under the diagnostic codes in 38 C.F.R. § 4.73. Under an exception to the general provision, however, “[a] through-and-through injury with muscle damage shall be evaluated as no less than a moderate injury for each group of muscles damaged.” 38 C.F.R. § 4.56(b).

In *Myler v. Derwinski*, 1 Vet. App. 571, 574 (1991), the Court interpreted § 4.56(b) as providing that a “‘through and through’ [muscle] wound was to be rated as of at least moderate degree of disability,” regardless of whether the muscle sustained any permanent damage. *See also Beyrle v. Brown*, 9 Vet. App. 377, 383 (1996). “[O]nce a through-and-through muscle wound is found to contain ‘muscle damage’ the rating becomes automatic.” *Id.* at 385; *see also Jones v. Principi*, 18 Vet. App. 248, 258 (2004) (citing C.F.R. § 4.56(b)) (noting where a claimant had sustained through-and-through injuries to muscle groups I and II, he was entitled “to have ‘each group of muscles damaged’ rated ‘as not less than a moderate injury’”). In addition, the Board must review or discuss all potentially applicable diagnostic codes, whether or not they were argued

below. *See, e.g., Schroeder v. West*, 212 F.3d 1265, 1269–71 (Fed. Cir. 2000); *Schafraath v. Derwinski*, 1 Vet. App. 589, 593 (1991).

According to the medical reports, immediately following the 1979 assault the Veteran’s physician noted a laceration just above the ankle, which was described as (1) “deep to the bone and muscle tissues with partial muscle severance,” R. 360; (2) “*extending through the anterior compartment muscle*,” R. 366 (emphasis added); and “*through the fascia compartment* and into the anterior tibial muscles in two places,” R. 370 (368–370) (emphasis added). In addition, the Veteran’s “abdominal wound [had] viscera extruding from the stab site,” R. 360, as well as “eight separate holes in various portions of the small intestine.” R. 356. The physician’s notes of a leg wound through the anterior compartment muscle and eight holes in the small intestine indicate evidence of a through-and-through injury to the muscles in the lower-right leg as well as the strong possibility of a through-and-through injury to the muscles around the abdomen. Nevertheless, neither of the VA medical examinations in 2010 and 2012 noted by the Board addressed the damage to the underlying muscles as a result of the stab wounds. Instead, the examinations were limited to “scars” or symptoms associated with the scars. *See, e.g.,* R. 80–94; R. 154–61. Thus, the examination reports were inadequate for evaluation purposes. *See* 38 C.F.R. § 4.2.

2. The Medical Examination Reports Failed to Consider Whether the Veteran Has Residual Muscle Injuries

Even assuming, *arguendo*, that it is determined Mr. Lewis did not sustain any through-and-through muscle injuries, the medical examination reports also failed to

consider whether Mr. Lewis currently has residual muscle injuries as a result of his service-connected stab wounds. When rating muscle injuries under 38 C.F.R. § 4.56, a “totality-of-the-circumstances” test is applied. *Tropf v. Nicholson*, 20 Vet. App. 317, 324–25 (2006). As discussed above, the record reflects that Mr. Lewis suffered multiple injuries to multiple muscle groups in connection with the stab wounds. Despite the evidence in the record of these muscle injuries, the medical examination reports extensively evaluated the scars resulting from the stab wounds but failed to evaluate whether the Veteran suffers residual muscle damage ratable under the general provisions of §§ 4.56, 4.73.

Accordingly, the Board’s conclusion that the examinations were adequate was constitutes prejudicial error because the Board failed to consider muscle damage under § 4.56 and § 4.73; the Board therefore erred in finding that VA satisfied its duty to assist. *See El-Amin*, 26 Vet. App. at 141.

C. The Board Failed to Address all Issues Reasonably Raised by the Record

The Board failed in its duty to address all issues reasonably raised by the record because the medical evidence directly raised the issue of compensable ratings based on muscle injuries. The Board is required to consider all issues reasonably raised by the evidence of record. *Solomon v. Brown*, 6 Vet. App. 396, 402 (1994). By regulation, the Board is required to construe a veteran’s arguments “in a liberal manner for purposes of determining whether they raise issues on appeal.” 38 C.F.R. § 20.202.

As discussed above, the Board failed to address the evidence of damage to the underlying muscles as a result of the stab wounds. The Board was required to address all relevant evidence, *Schafraath*, 1 Vet. App. at 593, yet the Board failed to address the evidence of an injury to the musculature in the lower-right leg and abdomen resulting from the service-connected stab wounds, *see* R. 356, 360, 366, 370 (368–370). Accordingly, the Board breached its duty to address the evidence of damage to the underlying muscles, which was reasonably raised by the record.

IV. CONCLUSION

The Board’s April 29, 2015, decision should be vacated and the appeal remanded for readjudication in accordance with the preceding discussion. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (“Generally, where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.”).

Respectfully submitted,

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